Friends of the Clearwater

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June 27, 2016

Cheryl Probert
Forest Supervisor
Nez Perce and Clearwater National Forests
903 3rd Street
Kamiah, ID 83536

SENT VIA EMAIL comments-northern-nezperce@fs.fed.us

Dear Supervisor Probert:

We wish to comment on the scoping letter containing several projects issued on May 27, 2016, the 'Small NEPA" proposals. These comments are on behalf of Friends of the Clearwater. We have concerns with the proposals. Some of them could have far greater impacts than could be categorically excluded from an environmental assessment (EA) or environmental impact statement (EIS).

AVISTA Buried Electrical Lines

Expanding electrical service to a remote area along the 222D, to facilitate summer home development in an area that had almost none of this about 20 years ago, would seem to require more than a simple CE. Will future lines be needed, or above ground lines, assuming the former mining claims are further developed for second homes? In other words, what are the cumulative impacts and connected actions of one mile of line? What about increased sedimentation from use of the 222D road that developing infrastructure in this remote area would engender?

These questions cast doubt on whether a CE is sufficient.

Blue Ribbon Test Drilling

An EA is required. There are reasons an EA is needed including the drill sites, according to the map, four or possibly five of the six proposed drill sites are located within RHCAs. Water withdrawals may be needed from area streams. The drill sites may affect ground water and that issues needs to be fully analyzed and explored as per a recent court case here in Idaho. There are also issues with ESA-listed species that may be in the project area or affected by the project such as steelhead. Siegel Creek is habitat for listed species. These issues are discussed in more detail below.

The scoping letter merely alleges that the work will be done in one year from the decision, the summer of 2017. The six locations may easily take more than a year to complete. Please explain and provide evidence why this project will take place in less than a year's time.

It should be emphasized the agency's duties under the ESA are not overridden by any "rights" the applicants may have under the 1872 mining law. The courts are clear in ruling that prohibitions under the ESA must be enforced, even to deny mining operation and: "of course, the Forest Service would have the authority to deny any unreasonable plan of operations or plan otherwise prohibited by law. E.g., 16 U.S.C. 1538 (endangered species located at the mine site). The Forest Service would return the plan to the claimant with reasons for disapproval and request submission of a new plan to meet the environmental concerns." (Havasupai Tribe v. U.S., 752 F.Supp. 1471, 1492 (D. Az. 1990) affirmed 943 F2d 32 (9th Cir. 1991) cert. denied 503 U.S. 959 (1992); See also Pacific Rivers Council v. Thomas, 873 F.Supp. 365 (D. Idaho 1995): Pacific Rivers Council v Thomas, 30 F.3d 1050 (9th Cir 1994) cert. denied 115 S.Ct. 1793 (1995)).

The issue of claim validity is important. This is important because the reasonableness of the proposed action needs to be adequately considered for such a large proposal.

Activity or facilities that are "reasonably incident" will vary depending on the stage of mining activity. Through case law that has evolved since 1955, the reasonably incident standard has been interpreted to include only activity or facilities that are an integral, necessary, and logical part of an operation whose scope justifies the activity or facilities. Activities that are "reasonably incident" would be expected to be closely tied to, and be defined within, what would be reasonable and customary for a given stage of mining activity. Such levels of activity would include initial prospecting, advanced exploration, predevelopment, and actual mining. Each stage is defined by an increasing level of data and detail on the mineral deposit that, in total, contribute to an increasing probability that the deposit can be mined profitably. Each stage also has an increasing impact on the land.

The logic of sequencing is also obvious to the Forest Service whose charge is the management of surface resources: Keep it small, to the extent practicable, and build, if warranted, from there. In other words, minimize the amount of disturbance to surface resources in order to prevent unnecessary destruction of the area, and to ensure to the extent feasible that disturbance is commensurate with each level of development. How do nine sample locations and trenches fit in with these requirements?

That simple principle is of paramount interest to the Forest Service that, by its Organic Act, is responsible on lands in the National Forest System "to regulate their occupancy and use to preserve the forest thereon from destruction." Equally important, the principle has been articulated by the 9th Circuit Court in *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*. The Court clearly articulated that mining is a sequential process composed on logical steps. Further, mining activity that would cause significant surface disturbance on lands in the National Forest System must be related to a logical step in that process and the steps must be in the proper sequence. And, significant disturbance requires more than a simple CE.

The scoping letter lacks enough information to make that determination. The question must be asked, "Has the claimant made the discovery of a "valuable mineral deposit" on this claim?" (30 U.S.C. 22). A mining claim location does not give presumption of a discovery. (Ranchers Exploration v. Anaconda). "[L]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim." (Cole v. Ralph, 252 U.S. 286, 294-96 (1920)).

In essence, the Forest Service is proposing to approve the project prior to any analysis and leaving specific details to a "field review" to take place later. The automatic assumption this is something that can be approved with a CE fails to take a hard look at the crucial issue of whether this complies with the

ESA, whether it complies with clean water law and policy for ground and surface water and the amount of time this project would take.

Please send us a copy of the plan of operations and any other documents submitted by the applicant for this proposal. If necessary, this a request for those documents submitted under the Freedom of Information Act.

We also formally request a fee waiver for all search and duplication fees under the FOIA regulations [5 U.S.C. Sec. 552(a)(4)(A)]. The organization "Friends of the Clearwater" is a tax-exempt, non-profit organization and will derive no commercial benefit from this FOIA.

The information requested will benefit the citizens of the United States and is for the purpose of public education and to encourage public debate on important policy issues. The requested information will be made available to the public through the Friends of the Clearwater office in Moscow, ID. University students, grassroots conservationists, journalists, scientists, and the general public use our office. Information given to the Friends of the Clearwater through the FOIA in the past has been used in press conferences and releases, media interviews, publications including our newsletter and those of other groups, and reaches a significant number of individuals nationwide.

The language of the FOIA clearly indicates that Congress intended fees not to be a barrier to private individuals or public interest organizations seeking access to government records. In addition, the legislative history of the FOIA fee waiver language indicates that Congress intended a liberal interpretation of the phrase "Primarily benefiting the public." This suggests that all fees be waived whenever the release of information contributes to public debate on important policy issues. This has been affirmed by the US Court of Appeals for the District of Columbia, in Better Government Association v. Department of State, 780 F. 2d 86 (D.C. Cir., 1986). In that case, the Court found that under the FOIA, Congress had explicitly recognized the need for non-profit organizations to have free access to government documents and that government agencies cannot impair this free access by charging duplication or search for FOIA information requests (Id. at 89). See also Judicial Watch v. Rossotti, 326 F.3d 1309 (D.C. Cir. 2003).

In considering whether Friends of the Clearwater meets the fee-waiver criteria, it is imperative that the USFS remember that FOIA carries a presumption of disclosure and that the fee-waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as Friends of the Clearwater access to government documents without the payment of fees. As stated by one Senator, "[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment's main purpose was "to remove the roadblocks and technicalities, which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." Id.

Lamb Creek Road Use Permit

The road is currently closed for wildlife and soil purposes. Since wildlife and even humans at times do not distinguish between agency, timber company or other vehicles, opening a closed road would have impacts not anticipated in the travel planning process. Further, sediment increases from log hauling need to be evaluated. As such, a CE seems inappropriate for this project.

The Forest Service should consider, as an option, closing an equal amount of open road in the Elk Analysis Area as mitigation for this project during project implementation. That would certainly lessen the impact of this project.

Nat Brown Fencing

While this fence project might improve riparian condition, a CE may be inappropriate because this decision is more properly made in an allotment management plan (AMP) or other determination of grazing suitability. The scoping letter does not disclose what existing grazing authorization is in place and what data there may be on the use, trend and carrying capacity of the allotment.

Simply put, by excluding livestock from the meadow for all or part of the season would likely alter the carrying capacity of the allotment. Without range condition and trend data, all that may occur is transferring the problem here to another place. The uplands may become overgrazed as a result.

Issues associated with this allotment (presumably, Purdue Creek) should have been made in the West Fork Potlatch EIS. We noted in past correspondence on this issue that one of the range documents in the West Fork Potlatch project file (dated 2/26/96) clearly noted that the then current grazing on the Purdue Creek allotment as 60 head, or cow-calf pairs, (12 on national forest and 48 on other) from 6/16 to 10/31. The FEIS and ROD approved exactly the same management (FEIS II-26 and ROD 4 and 5). The above noted project file document and the FEIS also have identical utilization standards of 50%, a continuation of the current standards from then till now.

Thus, the status quo was maintained under all action alternatives. However, that status quo is called into question in the project files. Document 2/26/96 states:

> After the grazing season of 1995, Kent Wellner and I measured grazing utilization in the Purdue Creek pasture and found the utilization was quite high at 80%. Mike Mathison reports that due to Neale's illness that they were not able to move the animals as much as would have been wanted, and that the animals spent quite a bit of time late in the season where we measured the utilization. Aside from the upland utilization, the riparian vegetation was not very abundant and the streamside areas could use some relief. The historical record on the Purdue Creek allotment indicates that for the 10 years previous to 1995, the average utilization was 60%, which is above the 50% target we are currently using for upland utilization. On the basis of this utilization data, and the findings of the Potlatch River Grazing document, it would not appear unreasonable to be looking at a reduction in Animal Months in the range from 10-25%. We can calculate what the reduction would be to theoretically reach the 50% utilization figure to come up with a specific number.

Here was a recommendation from the range specialist that alternatives to reduce Animals Months from 10 to 25% percent be implemented. Yet no alternative recommended such a course. The project file memo (1/24/2000) indicates that the Purdue Creek allotment's five year average exceeded 50% utilization in both pastures (Purdue Creek and Nat Brown), which had utilization figures ranging from 57 to 66%. If cattle were so heavily grazing the uplands, it stands to reason that the riparian areas are being hit even harder. Thus, the recommendation for a reduction in numbers by the range conservationist was valid. This does not appear to be an issue of distribution that fencing can solve. If that were the case, one would expect to see the riparian areas used well over 50% and the uplands used considerably under 50%. It seems to be an issue of stocking rates just as the range conservationist had determined in 1996. Have any of those problems, which were identified nearly twenty years ago, been addressed. If so, how were they addressed?

Given the utmost importance of this area as an anadromous fishery, grazing should be looked at more carefully. Fencing may only be an ineffective band aid.

National Forest System Road 4716-A Road Easement

This is not for the renewal of a road permit. Rather, it is for granting an easement to the state of Idaho. This does not fit the CE category under which it is proposed because there is no, "Exchanging NFS lands or interests." Rather, it seems to be a one-way deal. This is a property value, owned by all citizens of the US, that can't be given away, so cavalierly, without the opportunity for the public to comment on the impact of giving away the property right

The road is currently closed to full-sized vehicles. Will there be increased state use of the road under this easement?

Again, this proposal does not fit 36 CFR 220.6(e)(7). Why is an easement being proposed here?

National Forest System Road 5216E and 5216-1 Road Permits

These are for the issuance of road permits, unlike the previous proposal. However, unlike the previous proposal, there seems to be no existing road permit. Rather, it is for logging of adjacent state land. Further, the roads are closed for soil and water protection. Opening the roads up to logging vehicles would defeat the purpose of the closure. The Forest Service needs to analyze the impact of opening roads that have been closed on the water and soil resource.

The Forest Service needs to consider the cumulative impacts from this proposal with adjacent national forest proposals like French Larch, Lower Orogrande and possibly the salvage sales in and around upper Lolo Creek. As such, a CE seems inappropriate.

National Forest System Road 5326 and 5316A Road Permits

These roads are closed for soil and water protection. Opening them up to logging vehicles would defeat the purpose of the closure. The Forest Service needs to analyze the impact of opening roads that have been closed on the water and soil resource. Cumulative impacts need to be assessed as well. As such, a CE seems inappropriate.

Peasley Creek Culvert

This proposal, if carefully mitigated, would be beneficial and would most likely fit within CE parameters. Would a bridge be a better option than a culvert here on this creek, given its size?

Potlatch River Boundary Fencing

CE may be appropriate in this instance, as it does not seem to involve issues of allocation and use, unlike the situation for the Nat Brown Fence. Nonetheless, this does show the need to update the AMP.

Rebel/Beat Street Placer

An EA is required. According to the scoping letter, up to 100 6" test holes would be dug, maybe more, including 24" holes. While these test holes are not as deep as some, it seems impossible that they could all be completed in one year. Water withdrawals will be needed. The proposes sump(s) may affect ground water and that issues needs to be fully analyzed and explored as per a recent court case here in Idaho. There are also issues with ESA-listed species that may be in the project area or affected by the project such as steelhead. These issues are discussed in more detail below.

The scoping letter merely alleges that the work will be done in one year from the decision, the summer of 2017. The 100 locations may easily take more than a year to complete. Please explain and provide evidence why this project will take place in less than a year's time.

It is clear that activity will take place in RHCAs. Buffers of only 20 to 30 feet from water will be followed. As such, a CE is inadequate.

It should be emphasized the agency's duties under the ESA are not overridden by any "rights" the applicants may have under the 1872 mining law. The courts are clear in ruling that prohibitions under the ESA must be enforced, even to deny mining operation and: "of course, the Forest Service would have the authority to deny any unreasonable plan of operations or plan otherwise prohibited by law. E.g., 16 U.S.C. 1538 (endangered species located at the mine site). The Forest Service would return the plan to the claimant with reasons for disapproval and request submission of a new plan to meet the environmental concerns." (Havasupai Tribe v. U.S., 752 F.Supp. 1471, 1492 (D. Az. 1990) affirmed 943 F2d 32 (9th Cir. 1991) cert. denied 503 U.S. 959 (1992); See also Pacific Rivers Council v. Thomas, 873 F.Supp. 365 (D. Idaho 1995): Pacific Rivers Council v Thomas, 30 F.3d 1050 (9th Cir 1994) cert. denied 115 S.Ct. 1793 (1995)).

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The logic of sequencing is also obvious to the Forest Service whose charge is the management of surface resources: Keep it small, to the extent practicable, and build, if warranted, from there. In other words, minimize the amount of disturbance to surface resources in order to prevent unnecessary destruction of the area, and to ensure to the extent feasible that disturbance is commensurate with each level of development. How do nine sample locations and trenches fit in with these requirements?

That simple principle is of paramount interest to the Forest Service that, by its Organic Act, is responsible on lands in the National Forest System "to regulate their occupancy and use to preserve the forest thereon from destruction." Equally important, the principle has been articulated by the 9th Circuit

Court in *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*. The Court clearly articulated that mining is a sequential process composed on logical steps. Further, mining activity that would cause significant surface disturbance on lands in the National Forest System must be related to a logical step in that process and the steps must be in the proper sequence. And, significant disturbance requires more than a simple CE.

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In essence, the Forest Service is proposing to approve the project prior to any analysis. Specifics are not detailed. The automatic assumption this is something that can be approved with a CE fails to take a hard look at the crucial issue of whether this complies with the ESA, whether it complies with clean water law and policy for ground and surface water and the amount of time this project would take.

Please send us a copy of the plan of operations and any other documents submitted by the applicant for this proposal. If necessary, this a request for those documents submitted under the Freedom of Information Act.

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The language of the FOIA clearly indicates that Congress intended fees not to be a barrier to private individuals or public interest organizations seeking access to government records. In addition, the legislative history of the FOIA fee waiver language indicates that Congress intended a liberal interpretation of the phrase "Primarily benefiting the public." This suggests that all fees be waived whenever the release of information contributes to public debate on important policy issues. This has been affirmed by the US Court of Appeals for the District of Columbia, in Better Government Association v. Department of State, 780 F. 2d 86 (D.C. Cir., 1986). In that case, the Court found that under the FOIA, Congress had explicitly recognized the need for non-profit organizations to have free access to government documents and that government agencies cannot impair this free access by charging duplication or search for FOIA information requests (Id. at 89). See also Judicial Watch v. Rossotti, 326 F.3d 1309 (D.C. Cir. 2003).

In considering whether Friends of the Clearwater meets the fee-waiver criteria, it is imperative that the USFS remember that FOIA carries a presumption of disclosure and that the fee-waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as Friends of the Clearwater access to government documents without the payment of fees. As stated by one Senator,

"[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment's main purpose was "to remove the roadblocks and technicalities, which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." Id.

Wildfire Tree Planting Lochsa2 and North Fork Ranger Districts (two projects)

While these two proposals seem to fit within a categorical exclusion, we do question the need of these projects. For example:

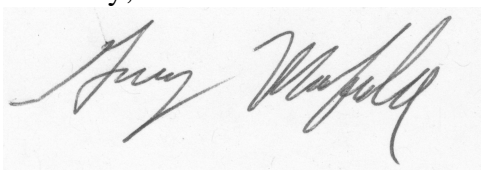
- These forests evolved with stand-replacing fire. There is nothing unnatural or even problematic about allowing natural regeneration. While you may choose to artificially replant, experience has shown that even in severely burned areas, natural regeneration occurs quite quickly.

- Justifying replanting white pine based upon resistance to disease is odd since it is susceptible to blister rust. Simply put, Douglas fir and even grand fir are more fit.

- If you choose to replant, we suggest you use local stock.

Please keep us updated on all of these proposals.

Sincerely,



Gary Macfarlane